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Supreme Court, U.S.
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RECORD NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

LUTHER R. BROWN, JR.

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

As a result of the alleged errors of the trial court, the following questions of law are presented by this petition.

1. Did the sheriff's, prosecution attorney's and court's refusal to permit the Petitioner to investigate the arson site result in a denial of his right "to call for evidence in his favor" and a violation of his constitutional right to due process of law.

2. Was the Petitioner denied constitutional due process of law by a conviction on insufficient evidence?

3. Was the Petitioner denied constitutional due process of law when the trial judge failed to investigate or even request a denial by the prosecutor upon receiving sworn testimony of three witnesses of a prohibited conversation between the prosecutor and a juror during the trial?

11. NAME OF PARTIES

The Petitioner is Luther R. Brown, Jr., hereby referred to as "Brown," whose counsel is named on the cover. The Respondent is the Commonwealth of Virginia, a sovereign state of the United States of America, hereby referred to as "Virginia". Counsel for the Respondent is Joel C. Branscomb, Commonwealth's Attorney for Botetourt County, P. O. Box 4, Fincastle, Virginia 24090; but if a writ of certiorari is granted for a review, counsel for the Respondent will be the Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219.

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IV REFERENCE TO REPORTS AND OPINIONS

There are no written reports or opinions in the proceedings sought to be reviewed. The prior orders are in the appendix including an order of the Court of Appeals of Virginia entered without oral hearing on September 11, 1995 elaborating on the reasons for the denial.

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds Brown was convicted in a state court of the crime of arson without being permitted to inspect the arson site to gather evidence in his defense in violation of Amendment Vl of the Constitution of the United States of America made applicable to state court proceedings by Section 1, Amendment XlV of the Constitution of the United States of America and also convicted on insufficient evidence in violation of Section 1, Amendment XIV of the Constitution of the United States of America and also by denial of trial by impartial jury guaranteed by Amendment Vl of the Constitution of the United States of America made applicable to state court proceedings by Section 1, Amendment XIV of

the Constitution of the United States of America; and

(1) The date of the entry of the judgment sought to be reviewed is April 10, 1996; and

(2) The date of the order denying a petition for rehearing was June 7, 1996 and there has been no extension of time within which to file this petition for a writ of certiorari which is accordingly due on September 5, 1996 (even though there has been a stay of mandate until September 5, 1996 and thereafter until this petition is disposed by this Court); and

(3) The statutory provision believed to confer jurisdiction on this Court to review the final judgment in question by writ of certiorari is 28 U.S.C. § 1257(3).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions which are involved are Amendments VI and XIV, Section 1 of the Constitution of the United States and are set forth in the appendix.

VII. STATEMENT OF CASE

The warrant charging Brown with arson

on June 8, 1994 was issued on June 13, 1994. The first motion for investigation of the arson site specifically raising the constitutional issues hereby presented was filed within fifteen days. The facts are more elaborated in Part C. of this Statement of the Case.

During the course of the trial on January 17 and 18, 1995, Brown moved for dismissal because the evidence was insufficient raising the constitutional issue of conviction without evidence. These facts are stated under Part B.

After the trial was over when Brown reported a prohibited conversation between the prosecuting attorney and a juror, a post-trial motion was made to set aside the verdict, heard and denied by the trial court. All three of these constitutional issues were asserted in the petition for appeal to the Court of Appeals of Virginia which responded to them in the order denying the petition as parts 1, 11, and 111 respectively in that order. The same three constitutional issues were raised again in the petition of appeal to the Supreme Court of Virginia and are now being repeated in this petition for writ

of certiorari.

There are three transcripts of the trial and other incidents of proceedings in the trial court. Numbered page references to the transcript of the trial on July 17 and 18, 1995 are preceded by the letter, number and hyphen "T1- "; to the transcript of the hearing on March 6, 1995 by "T2- "; and to the transcript of the hearing on April 11, 1995 by "T3- ". A reference to an exhibit is by its number as identified at the trial.

A. BACKGROUND:

Prior to the alleged arson on June 8, 1994 of a house on Hunter's Trail in Botetourt County, L. R. Brown, Jr. was occupying it under a written lease from L. R. Brown, Jr. Painting and Wallcovering Contractors , Inc., the then owner. The title of said corporation was subject to the liens of two deeds of trust. The second lien was held by Bertie G. Wheeler [Wheeler].

According to the testimony of Wheeler, Brown moved into the house and refused to pay the note assumed or the new note. According to Brown, Wheeler had misrepresented facts about the house and

furniture he was buying and he wanted his money back. He then found a buyer for the house but Wheeler would not give him a "pay-off" on the note. Apparently the dispute (to the extent material) is Wheeler wanted Brown out of the house and Brown wanted out too but wanted his money back or to sell the house and receive his money back which required a "pay-off" from Wheeler. She refused a "pay-off" and told him she would foreclose with no money to Brown's corporation and then sell to the buyer herself.

Wheeler did foreclose but did not bring eviction proceedings against Brown who was a lawful tenant. On the day of the fire, she forcible removed him. While Brown did obtain some clothes when physically being evicted on June 8, 1994, he left behind furniture, business records, a word processor and business equipment. Except for some furniture found in a warehouse, he lost these assets and had no insurance for the loss. On the other hand, Wheeler had insurance and received approximately $42,000.00 because of the fire, obtained possession without paying Brown his downpayment, and sold the

house to another on the same terms she intended to sell to Brown. She did make repairs because of the fire damage, but there is no testimony whether it cost as much as the insurance proceeds.

B. THE EVENTS OF THE FIRE:

Prior to June 8, 1994, Brown had been frequently calling the sheriff's office in Botetourt County complaining about persons breaking into his residence. On May 31, 1994, Brown was awakened and went downstairs and found kerosene poured on the floor and a lit candle in the middle which would ignite the kerosene when it burned to the bottom. Telephone wires had been pulled from the box leaving Brown without communication. He reported this to the Sheriff and an investigator saw the site.

In the early morning of June 8, 1994, Brown was in bed and heard the smoke alarm. He went to the bedroom door. Smoke was bellowing into the room and the door was hot. He put on clothes and jumped out the window. He scratched himself on the brick outside the house when pushing off it. He went to a neighbor's house and banged on the door. When there was no

response, he then drove to a nearby public telephone and called "911" for emergency. He then returned. A deputy sheriff came to the scene and then a life saving crew. The emergency technician noticed the scratches on his arm and also noticed he was having difficulty breathing (allegedly from the smoke) and took him to the emergency room of a local hospital in Roanoke [T1-220 and 221]. After he left the hospital, he went to his mother's house in Roanoke to rest and later was driven to the house by his sister with his mother present. While there, he was assaulted and put out of the house by a friend of Wheeler.

A deputy sheriff, Nelson Tolly, arrived at 6:15 A. M. to investigate for arson and was assisted by Rodney Ferguson, as assistant fire marshall of Roanoke County. When he left at approximately 4:45 P. M., he was through the investigation and only returned within a week to remove door locks and take more photographs [T1-171 and 172]. He specifically said:

> "When I left the scene, I was basically through" [T1-172].

Neither Mr. Tolly nor Mr Ferguson found the origin of the fire but determined it

was in the area of the hall and stairway. Because they could find no cause of accidental fire, they assumed it had to be intentionally set; but they could find no "hot spot" or other proof of a specific ignition. They investigated the wires for deformities (melting etc.) igniting the fire and found none, but the electricity was off at the time of their investigation.

Their belief Brown was guilty of this arson (if it was arson) was based on statements of Brown to the emergency crew. (He made no statement to a deputy until later in the day after Tolly and Ferguson had completed their investigation.) Brown stated he exited by the window and they did not think Brown could have gone out the window. Outside they did not see a disturbance of the grass as if someone had jumped. Also Brown said the door was hot and he could not leave through it and when he went to go back in, the outside door was hot. Neither thought the fire would have made either door hot.

On the other hand, a firefighter at the scene said:

"When we first walked in, it was heavy smoke and a lot of

> heat. We were down on the ground. We worked our way through the house, searching the house, worked our way into the kitchen and found no fire." [T1210 and 211]

All the witnesses testified there was excessive soot on the furniture See: T1-187 (last answer) [T1-400 and 401].

When Brown finally made his investigation of the house on August 19, 1994, he found a footprint which was photographed (Exhibit D) and took off his boot and it matched the imprint which was photographed (Exhibit D1 and D2). The commissioner in chancery supervising the visit testified the grass under the footprint was absolutely dead and the impression in the ground fit the boot. They went inside and the house was freshly painted and no evidence of fire damage [T1-389]. Brown then exited through the window. While it took some time to open the window, once it was opened, Brown exited very quickly and disturbed nothing (T1-390 and 391]. After Brown jumped out the window, he had scratches on his arms (which were photographed) from pushing off the house (which left no residue on the brick) and, except for the inability to

breathe), he had the same injuries he had on the morning of June 8, 1994. When he landed on the ground, he was close to where the footprint had been found [T1-356]. Also some of Brown's furniture which had been removed from the house after the fire was found in a warehouse. The nightstand in front of the window was covered with black soot (see Exhibits B & C] covering any trace of touching it on going out the window.

In addition Michael J. St. Clair testified to an alleged confession by Brown which is discussed in the argument.

C. INABILITY TO INVESTIGATE:

The warrant was obtained on June 13, 1994. On June 15, 1994, Wheeler's lawyer wrote Brown requesting he remove his belongings from the house within five days [Exhibit A]. Brown made arrangements to go to the house on Saturday, June 18, 1994. Because he was now charged with arson, he hired a private detective to go with him to assist in investigating the site for his defense. Because the investigator had read a newspaper report of the arson charge that same day, he thought the house might be a crime scene controlled by the

sheriff and telephoned the sheriff. Notwithstanding Mr. Tolly had completed his investigation, the investigator received a message from the sheriff that if Brown or his investigators went on the property, he would be arrested for trespass until the house was cleared as a crime scene [T1-334]. During the following week, Brown employed this counsel to obtain permission to inspect the site. On June 24, 1994, counsel filed a motion with the general district court with a suggested order, but then negotiated with the prosecuting attorney for Brown to visit at 5:00 o'clock P. M. on July 5, 1994. Several minutes before the inspection, the prosecutor called counsel and said it was no longer a crime scene and the owner did not want Brown on the property. Because Brown had already left for the scene, counsel called the investigator by conference call so there was a witness to the prosecutor calling off the investigation; and the investigator went to the scene and stopped Brown. The motion was heard on July 8, 1994 and denied on the grounds it was no longer a crime scene under the control of

the court which had no authority over private parties and their title dispute. Brown was told again by the prosecuting attorney that if he went to the scene, he would be charged with trespass but the prosecutor might arrange for the investigator to go without Brown (but this offer was never made). [T1-337 through 341].

Brown then made a motion for a subpoena duces tecum for Wheeler to produce the site and this was denied on June 17, 1994 on the grounds that, even though Brown did have a constitutional right to investigate, the subpoena was only to produce documents. The court had no authority to order visit on private property. Brown then filed a suit in equity for discovery and the trial court entered a consent decree permitting the investigation supervised by a commissioner in chancery. Except for the footprint, the evidence had been destroyed before this inspection. During this entire time, Wheeler's lawyer did not oppose the investigation, wrote the letter for Brown to go on the property [Exhibit A] and signed the consent decree for the

investigation only requiring that once Brown completed his investigation, he surrender possession to Wheeler without claiming forcible entry. All the threats of arrest for trespass came from the sheriff or prosecuting attorney.

While the prosecuting attorney made a pretense of arranging a visit without Brown (but never offered), the sheriff made Virginia's position very clear. When testifying at the trial and asked on cross examination why Brown could not investigate, the sheriff said:

> "...that would be tantamount to saying that ... if you've got a murder scene, that you let the suspect go out and go back through the house and conduct an investigation...."
>
> " In my opinion, that would be tantamount to anybody that commits a crime, allowing them, a burglar for instance, who breaks into somebody's house, allow them, a week later, by order of the Court to go back through the house that was burglarized and, look through for whatever reason, that's in, in my opinion, that's absurd." [T1-268]

D. MISCONDUCT:

After the trial, Brown moved to set aside the judgment because the prosecuting attorney had talked to a juror in front of the courthouse during a late recess. While

three witnesses testified to the incident, they could not pinpoint the time. On guessing, all three testified it was between 11:00 o'clock P. M. and midnight. Because the jury was sequestered at approximately 11:00 o'clock P. M., the trial court struck the evidence. There was no inquiry of the juror and denial by the prosecuting attorney even though there was a special prosecutor appointed for this hearing freeing the prosecuting attorney to testify.

IV

ARGUMENT

Point No. 1. BROWN WAS DENIED HIS RIGHT UNDER BOTH THE UNITED STATES AND VIRGINIA CONSTITUTIONS TO CALL FOR EVIDENCE ON HIS BEHALF.

For there to be a fair criminal trial, the rights of the accused to gather evidence must be equal to the rights of the Virginia; and the rights of Virginia must be equal to the rights of the accused. Neither should be hindered by the other. This is mandated by Art 1 § 8 of the Constitution of Virginia. *Bobo v. Commonwealth,* 187 Va. 774, 779. 48 SE 2d 213, 215 (1948). (Holding attorney for the

accused had no right to be present when the attorney for the Virginia interviewed each witness and the attorney for Virginia had no right to be present when the attorney for the accused interviewed each witness; and the denial of the right of the attorney for the accused to interview a particular witness in jail was reversible error.)

Also Amendment XIV, Section 1 of the United States Constitution requiring states to exercise "due process of law" in criminal proceedings incorporates Amendment Vl of said Constitution otherwise binding on federal courts. See: *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed 158 (1932).

Here Brown sought to investigate the arson site to determine the origin of the fire, to determine he could have exited through the window, and to determine there was evidence on the ground of his exit. The witnesses for the prosecution found no source of the fire and concluded it must have intentionally set because there was no evidence of accidental ignition. Virginia wishes the accused to accept this dubious conclusion of arson without

investigation by the accused. Next Virginia wishes for acceptance of Brown's guilt because he could not have have exited by the window or his exit would have left traces. When Brown finally received the opportunity to investigate after the fire damage had been repaired, he was able to exit through the window very quickly even though he had some difficulty opening the window. He testified the window had become more difficult to open since the day of the fire. Also Virginia says there is no evidence of footprints of Brown jumping out the window or marks on the brick where he scratched himself in exiting. Yet he again scratched himself precisely the same way when proving he could leave by the window and left no traces on the brick; and he found a footprint where he had landed before. Because of the delay, Virginia was able to casts doubts on whether it was made at the time [See T1-333]. An immediate inspection would have given Brown the opportunity to call for evidence in his favor. The initial request by Wheeler for Brown to remove his belongings [Exhibit A] was before any repair work.

The sheriff testified the reason he told the investigator on June 18, 1994 he would be arrested if he went on the site was he (sheriff) had it roped off as a crime scene [T1-265; last answer]. Yet when asked why Brown could not go on the property when it was no longer a crime scene by the time of the motion, the sheriff implied the owner did not want him on the scene [T1-267]. Yet when asked how this could be true when Brown had a letter from the owner authorizing him to go on the crime scene, the sheriff retreated and stated, "Well it was a crime scene." [T1-267]. Obviously the sheriff was not going to let Brown investigate.

There is ample authority that when the police prohibit the accused from making an investigation, it violates due process of law required by the Sixth and Fourteenth Amendments of the U. S. Constitution and Art 1, § 8 of the Virginia Constitution. For example, *In Re: Newman*, 175 Cal App 2d 862, 1 Cal Rptr 80, 78 A.L.R. 3d 901 (1959), the accused was charged with public drunkenness. While in jail after the arrest, he asked to call his own physician

at his own expense to determine his sobriety; and this was denied. The court held that while the police did not have to offer him a sobriety test unless he was charged with driving a motor vehicle while intoxicated, the accused had the right at his own expense to call the physician. When denied that right, he was denied due process of law for a fair trial or, as argued here, the right to "call for evidence in his favor." The Supreme Court of Virginia ruled the same in *Deaner v. Commonwealth*, 210 Va. 285 (1969). There the accused was arrested for drunk driving and wished to call his lawyer before deciding on whether to refuse to have his blood taken under the implied consent law. He was not given the opportunity to consult with his lawyer and refused the blood sample. The Court held that this violated his right to counsel and avoided his criminal conviction but, over a vigorous dissent by Justice (now Chief Justice) Carrico, held the implied consent law was civil and the denial of counsel did not avoid the civil revocation of his driver's license.

The principles hereby argued were

reaffirmed in *Cox v. Commonwealth*, 227 Va. 324, 315 S.E.2d 228 (1984). An opinion by Justice Stephenson cited with approval the holding by this Court in *United States v. Nixon*, 418 U.S. 683, 94 S.C. 3090, 41 L.2d 1039 (1974) as follows:

> "The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed by the prosecution or by the defense." 418 U.S. at page 709. Also 227 227 Va. at page 328.

Mr. Justice Stephenson further wrote that if the evidence needed by the accused was in possession of a third party, it was subject to a subpoena duces tecum. In that case, the materials were documents. In *Nixon, supra*, they were tape recordings. Here a "crime scene" on real estate is involved.

Brown was denied the right to inspect while the house was a crime scene in possession of Virginia, and then denied possession from the sheriff when terminating the crime scene, and then

denied a subpoena to inspect the crime scene because such subpoena lies only for documents and not houses. In rejecting Brown's motion for suppression of the evidence or dismissal, the trial court ruled:

> "Court: [Counsel], as an experienced trial lawyer as you are you made a motion on the District Court on a felony case and it was denied down there there and you really thought it was an important issue you would have found some way to have Court.
>
> "[Counsel: Well that's what I did do.
>
> "Court: Yeah, eventually on, as a civil action." [T1-322 and 323].

The problem is the trial judge did not say how counsel was supposed to appeal when there is no appeal until after the preliminary hearing.

When counsel for Brown realized he would not be able to obtain an investigation of the site without appealing to the trial court prior to the preliminary hearing, he thought of two "far out" procedures. One was to file a petition for writ of habeas corpus naming the bail bondsman as defendant but joining in Virginia and alleging he was being unlawfully incarcerated (on bail) by a procedure which would not permit him to

call for evidence in his favor. The other was to file a bill of complaint in equity for discovery. Such a suit for discovery is not supposed to affect a criminal case; and the allegations were that while Brown would incidentally use the information for his defense in the criminal prosecution, he needed the same information for a suit for forcible entry and obtaining information would not otherwise affect the criminal case. Counsel thought that such a procedure may be considered frivolous by the trial judge. It was certainly unorthodox. Yet it was the only way to appeal to the trial judge who later ruled at the trial counsel should have found some way to appeal to him earlier. What is that way?

By this petition, Brown argues that until some statute or ruling is adopted for inspection of land in a criminal case by a different process, the remedy is by subpoena duces tecum even though this writ is historically restricted to production of documents. This avoids a ruling that there is no constitutional procedure in Virginia to protect an accused. Of course, there is still no protection for

denial of the inspection by a general district court if it can not be appealed to the circuit court until there is an indictment after the preliminary hearing. In any event, Brown's conviction must be reversed.

Point No. 2. THE CONVICTION WAS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES CONSTITUTION BECAUSE OF INSUFFICIENCY OF THE EVIDENCE.

When a building is burned, the presumption is that the fire was caused by an accident rather than by intentional act of the accused. *Stine v. Commonwealth*, 162 Va. 856, 174 S.E. 758 (1934) (Holding evidence insufficient to convict.) In the case at bar, neither witness for the prosecution could not find a cause of the fire and presumed it was intentionally ignited because of no proof of accidental ignition. In a prosecution for arson, special care should be exercised as to the corpus delecti, and there should be no conviction except where this part of the case is proved with particular clearness and certainty. *Brown v. Commonwealth*, 87 Va. 215, 12 S.E. 472 (1890) (Also holding evidence insufficient to convict.) Proof that Brown was at the site was insufficient particularly when he was a

victim of the fire having trouble breathing and taken to the hospital to treat this condition.

In *Jones v. Commonwealth,* 103 Va. 1012, 49 S.E. 663 (1905), the owner of the arson site discovered tracks from the accused's house. The Virginia Supreme Court held the inability of Virginia to prove another criminal agent was insufficient and did not require the accused to vindicate himself. In *Garner v. Commonwealth,* 2 Va. Dec. 458, 6 S.E. 507 (1897), the Virginia Supreme Court held the evidence that the fire was incendiary, that the accused had an opportunity to commit the crime, and that he cherished ill feelings towards the owner of the property destroyed did not warrant a conviction. In that case, a mill house was burned; tracks were discovered leading from the mill to the accused's house; and the accused held ill feelings toward the owner. The accused admitted stopping by the mill and these were his footprints but denied the arson.

In *Simmons v. Commonwealth,* 208 Va. 778, 160 S.E.2d 120 (1968), the Virginia Supreme Court held by an opinion of

Justice (now Chief Justice) Carrico the evidence was insufficient. The evidence placed the accused at the scene of the fire with an opportunity to start the fire. This was insufficient to overcome the presumption the fire was cause by accident and also insufficient to show (if it was arson) the accused set the fire. Virginia must prove the accused's guilt beyond a hypothesis consistent with innocence.

While recognizing her evidence was weak and circumstantial, Virginia relies on the testimony of Michael J. St. Clair. He testified he was in a restaurant in Roanoke several days after the fire and heard Brown confess. Brown denies it. While the credibility of a witness is normally for the jury to decide and this negates the legal argument the evidence was insufficient to convict, the use of Mr. St.Clair for such purpose was outrageous and shocking to the criminal justice system. Mr. St.Clair was an admitted felon. He had taken money for his testimony in courts on many occasions; but was no longer used because he was fabricating narratives of guilt to obtain

money [T1-329 and 330]. Even in this case, after testifying to the alleged confession of Brown and testifying he had no motive to testify except to tell the truth, he later became angry because he was not paid [T3-27] indicating he had lied.

Beyond question, it is a violation of the due process clause of the Fourteenth Amendment for a state to convict an accused on perjured testimony. *Napue v Illinois*, 360 U.S. 264, 3 L 2d 1217 (1959). A conviction on insufficient evidence is a denial of due process of law under Section 1, Amendment XIV of the United States Constitution. *In Re: Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.2d 368 (1970).

Point No. 3. ADDITIONAL INVESTIGATION OR A NEW TRIAL SHOULD BE GRANTED BECAUSE OF THE ALLEGED CONVERSATION BETWEEN A JUROR AND THE PROSECUTING ATTORNEY.

Brown accused the Commonwealth's attorney prosecuting the case of having a conversation with a juror in front of the courthouse during a recess and two witnesses corroborate him. It is a fundamental rule of law that if a juror

listens to a statement of a person made to him or her about a material matter at the trial when such person is not on the witnesses stand or to the arguments of a lawyer not made in open court, the conduct is improper. *Yeary v. Holbrook*, 171 Va. 266, 198 S.E. 441 (1938). While Brown was the movant of the hearing on April 11, 1995 and had the burden of proving the conversation, he met such burden when the three witnesses testified. That was sufficient to require the prosecuting attorney to deny it, particularly when the Commonwealth was represented by a special prosecutor from Rockingham County. There was no denial but instead the evidence was struck.

The special prosecutor argued the evidence of Brown was insufficient because counsel for Brown should have subpoenaed the juror. By this petition, Brown suggests investigation by counsel of the juror under the circumstances not proper. If the trial court had not struck the evidence and required the Commonwealth's attorney to testify, then the juror might or might not be needed according to what he testified. In *Dozier v. Morrisette*,

198 Va. 37, 92 S.E. 366 (1956), an affidavit was filed there had been communication between Whitehurst and the jury; and then the judge required Whitehurst and the juror to state the conversation. It developed Whitehurst had told the juror about insurance coverage and this was fully discussed by the jury. The Supreme Court of Virginia overruled the denial by the trial court of a new trial.

The failure of the trial court to investigate results in a denial of trial by impartial jury. In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct 1444, 20 L.2d 491 (1968), this Court held the right of trial by jury guaranteed by Amendment Vl of the United States Constitution is applicable to state court criminal proceeding pursuant to Section 1, Amendment XlV of said Constitution. Thus the partiality of a juror is a federal constitutional issue to be decided by this Court.

IX CONCLUSION

By its order on April 10, 1996 and confirmed by its order on June 7, 1996 denying a petition for rehearing, the Supreme Court of Virginia decided very

important questions of federal constitutional law contrary to the decisions of this Court. Accordingly a writ of certiorari should be granted to review the decision, answer these very important questions of federal constitutional law, and correct an injustice to the Petitioner.

Respectfully submitted,

Luther R. Brown, Jr.

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XI APPENDIX

The Appendix consists of:

1. A copy of the order on Jule 7, 1996 by the Supreme Court of Virginia denying a rehearing [A-1].

2. A copy of the order on April 10, 1996 by the Supreme Court of Virginia denying the petition for appeal from the Court of Appeals of Virginia [A-2].

3. A copy of the order on December 11, 1995 by the Court of Appeals of Virginia denying the petition for appeal from the Circuit Court after oral hearing on the petition [A-3].

4. A copy of the order on September 14, 1995 of the Court of Appeals of Virginia denying the petition for appeal without oral hearing by a panel with a decision by one judge [A-4].

5. Pertinent portions of the text of consitituionl provisions cited in Part VI of this Petition [A-15].

A P P E N D I X

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 7TH DAY OF JUNE, 1996.

Luther Robert Brown, Jr.,

Appellant,

against Record No. 960070
Court of Appeals Nos. 0990-95-3

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of april, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Koontz took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 10TH DAY OF APRIL, 1996.

Luther Robert Brown, Jr.,

Appellant,

against Record No. 960070
Court of Appeals Nos. 0990-95-3

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

Justice Koontz took no part in the consideration of this case.

A copy,

Teste:

David B. Beach, Clerk

By: Aignisns

Deputy Clerk

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON MONDAY THE 11TH DAY OF DECEMBER, 1995.

Luther Robert Brown, Jr.,

Appellant,

against Record No. 0990-95-3
Circuit Court No. 94000259-F

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Botetourt County Before Judge Overton, Retired Judges Middleton and Penn*

For the reasons previously stated in the order entered by this Court on September 14, 1995, the petition for appeal in this case hereby is denied.

*Retired Judges Thomas J. Middleton and Carleton Penn took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A copy,

Teste:

Cynthia L. McCoy,

Acting Clerk

By: Marty P. Ring

Deputy Clerk

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON THURSDAY THE 14TH DAY OF SEPTEMBER, 1995.

Luther Robert Brown, Jr.,

Appellant,

against Record No. 0990-95-3
Circuit Court No. 94000259-F

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Botetourt
Before Judge Bray

This petition for appeal has been reviewed pursuant to Code § 17-116.05:2(C) and is denied for the following reasons:

1. In reviewing a trial court's denial of a motion to suppress, "the burden is upon [the appellant] to show that this ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error." Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E. 2d 729, 731, cert. denied, 449 U.S. 1017 (1980).

On June 27, 1994, appellant filed a motion in general district court asking

for "an order permitting him and his investigator to inspect the premises allegedly damaged by arson." On July 15, 1994, appellant filed a subpoena duces tecum commanding Bertie Wheeler, the putative owner of the burned house, to make the crime scene (realty) available for inspection by him and his attorney. The June 27, 1994 motion for inspection was denied on July 8, 1994. On July 18, 1994, after hearing argument by counsel, the district court judge ruled that a subpoena duces tecum did not lie for the production and inspection of realty.

On July 27, 1994, appellant and Wheeler entered a consent decree in which the parties agreed that appellant,

> his arson investigators, building contractor and others chosen by him or his lawyer, John H. Kennett, Jr., be, and they hereby are given the opportunity to inspect the arson site at their respective risks as to injury on a date fixed by the commissioner in chancery between the hours of 1:00 p.m. and 6:00 p.m.

On November 21, 1994, appellant filed a motion in the circuit court asking that the indictment be dismissed or that all evidence from the scene of the fire be suppressed. Appellant contended that, when he gained access to the crime scene pursuant to the July 27, 1994 consent decree, "all the rooms had been completely remodeled, all the evidence completely torn away and all of the [appellant's] personal belongings had been removed leaving very little for the [appellant] to investigate." Appellant argued that he was denied his "right to develop evidence on his behalf" as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 8 of the Virginia Constitution.

Appellant was tried on January 17, 1995. After the Commonwealth rested, appellant informed the trial court that "there's a written motion in the file

asking that the charge be dismissed on the grounds the defendant was denied his constitutional rights under the sixth amendment to develop evidence on his behalf." Appellant summarized the arguments to and rulings from the district court, and he argued that he was denied due process because he was not allowed access to the crime scene until after the burned building had been cleaned and repaired.

At trial, Wheeler testified that, after the fire, she began taking steps to clean and repair the burned property. Wheeler hired Mr. Herring to haul some items from the damaged house. Before Herring cleaned up, Wheeler's attorney contacted appellant and gave him "notice to come and get" his property "if he wanted to." Wheeler also "called [appellant] to give him notice." Unable to contact appellant personally, Wheeler

left a message with appellant's mother that appellant could retrieve his property. Appellant never came.

Appellant conceded that he had access to fifty-seven photographs taken at the crime scene by the Commonwealth. These photograph were taken at various locations inside and outside of the burned house, and thoroughly depicted the crime scene.

Officer Mandeville testified that appellant inspected the house in August 1994. At trial, appellant introduced four photographic exhibits taken by his investigator on August 19, 1994. These photographs depicted an alleged heel print found in the grass outside of a window, appellant's boot next to the alleged heel print, and appellant climbing out of a window. appellant's investigator took three additional photographs at a storage facility. They depicted furniture that

was in the home at the time of the fire.

The trial judge asked defense counsel whether he appealed the district court's denial of access to the crime scene, and defense counsel responded that "I didn't appeal it, I had nothing to appeal." Noting Wheeler's offer to allow an investigator access to the crime scene and appellant's failure to promptly pursue his motion to inspect in the circuit court following the ruling of the general district court, the trial judge concluded that there had been no "denial of due process." The record further establishes that appellant actually inspected and photographed the crime scene and collected evidence in addition to that shared with him by the Commonwealth. Under such circumstances, we cannot find that appellant was denied due process.

11. "On appeal, we review the evidence in the light most favorable to

the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. Martin v. Commonwealth, 4 Va. App. 438, 433, 358 S.E. 2d 415, 418 (1987).

The trial court qualified Deputy Sheriff Tolley as an arson expert. Tolley testified that he ruled out all accidental causes of the fire. He opined that the fire began in the basement. Tolley found a large amount of fuel/accelerant "poured around" the basement floor. Michael St. Clair testified that he met appellant about a week after the fire, and appellant admitted setting the fire because he was about to be evicted. Appellant told St. Clair that "he set the fire downstairs with kerosene." Wheeler testified about her legal disputes with appellant over the property. She described her protracted efforts, beginning in October 1993, to recover the property and evict appellant.

On June 7, 1994, Wheeler succeeded in foreclosing on the property and filing the deed for it in her name. On June 8, 1994, the fire occurred while appellant was in sole physical possession.

The fact finder believed the Commonwealth's evidence and rejected appellant's evidence. "The weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide." Bridgeman v. Commonwealth, 3 Va. App. 523, 528, 351 S.E. 2d 598, 601 (1986). The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of arson.

111. A trial court has broad discretion in determining whether to grant a mistrial. Manning v. Commonwealth, 2 Va. App. 352, 356, 344 S.E. 2d 197, 199

(1986). Appellant testified that he saw the prosecutor and an unnamed juror talking on the courthouse steps during a recess at trial. Appellant "couldn't hear the conversation." Kamara Goad, appellant's girlfriend, testified that she was outside the courthouse after 11:00 p.m. when she heard an unnamed juror remark that "she had to get up early the next morning to go to work and that she ... wanted this to end once and for all and tonight." Goad did not hear the prosecutor say anything. Sharon Hildreth, Goad's mother, testified that she was on the courthouse steps between 11:00 p.m. and midnight, closer to midnight, when she saw the prosecutor and an unnamed juror talk for several minutes. Hildreth stated that she "heard nothing" between the prosecutor and the juror. On cross-examination, Hildreth conceded she did "not know whether they had a conversation

or not."

The trial transcript showed that the trial judge interrupted defense counsel during his closing argument to tell him "[i]t's almost 11:00, I'm going to give you five more minutes and then you're going to have to sit down." Counsel finished argument shortly after the court's comment, and the trial judge directed the jury "to retire to the jury room... and deliberate." At that point, the jury was sequestered until its verdict.

The record supported the trial judge's determination that the unnamed juror could not have been outside after 11:00 p.m. Moreover, the trial judge found the evidence incredible. "The weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide." Bridgeman v.

Commonwealth, 3 Va. App. 523, 528, 351 S.E. 2d 598, 601 (1986). Accordingly, the trial court did not abuse its discretion in refusing to grant a mistrial.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17-116.05:2 (D).

A copy,

Teste:

Richard R. James,

Clerk

By: Marty P. Ring

Deputy Clerk

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS CITED IN PART Vl OF THIS PETITION

(1) Amendment Vl of the Constitution of the United States in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law..; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(2) Amendment XlV, § 1 of the Constitution of the United States in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."